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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72—

72-1090

FRANK NADALINE, JOSEPH NADALINE
and LAWRENCE LEROY SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FRANK NADALINE, JOSEPH NADALINE
and LAWRENCE LEROY SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming judgments of conviction against all petitioners under 18 U.S.C. § 1951 entered in the United States District Court for the Southern District of Florida.

Opinion Below

The opinion of the Court of Appeals is not yet reported and is reproduced as Appendix A, *infra*, pp. 1a-14a.

Jurisdiction

The judgment of the Court of Appeals was entered on January 3, 1973 App. B, *infra*, p. 15a). An order signed by Mr. Justice Powell extending until February 12, 1973 the time within which to petition for certiorari was entered on January 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory

process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Questions Presented

1. Whether the jury foreman's intentional concealment of his close and long-standing relationship with one of counsel deprived petitioners of their right to trial by an impartial jury?

2. Whether the admission into evidence of a prior conviction obtained in violation of the constitutional right to the assistance of counsel deprived petitioners of due process of law?

Statement

Petitioners were convicted by a jury of conspiring from January, 1971 to August, 1971 to obstruct commerce by extortionate means. In addition, petitioner Frank Nadaline was convicted on two substantive counts of obstruction of commerce by extortionate means, petitioner Joseph Nadaline was convicted on three such substantive counts, and petitioner Lawrence Leroy Smith was convicted on one such substantive count. Frank Nadaline was sentenced to a term of four years in prison on each of the three counts on which he was convicted; Joseph Nadaline to a term of three years in prison on each of the four counts on which he was convicted; and Lawrence Leroy Smith to a term of one year in prison on each of the two counts on which he was convicted. The terms of all petitioners are to run concurrently.

During the period covered by the indictment, Frank Nadaline was Chairman of the Board of Directors of Harrison Fotochrome, Inc. ("Harrison" or "the Company"), a public corporation with over ten thousand stockholders, engaged in the business of operating photofinishing plants

in Denver, Cleveland, New York and Florida. Joseph Nadaline, Frank's son, and Lawrence Leroy Smith were employees of Harrison.

To summarize the facts briefly, this case involves a Harrison salesman who quit after admittedly diverting from the Company monies due to it from the customers he serviced. Immediately after leaving Harrison, the employee went to work for a competitor, taking with him the business of certain of the customers whose accounts he had serviced while employed by Harrison. The petitioners' convictions result from efforts made by them to get back for Harrison the accounts taken by this faithless employee. The jury verdict established that these efforts included one occasion on which the former employee was subjected to physical force, a threat of physical harm to the competitor, and the breaking of a window at the competitor's place of business.

Reasons for Granting the Writ

1. Subsequent to trial, it was discovered that juror Milton Forman (who was the foreman of the jury) and Joseph A. Varon, Esq., trial counsel for petitioner Frank Nadaline, had intentionally concealed from the Court, the other defense counsel and the petitioners, their apparently close and concededly long-standing relationship. Mr. Varon was immediately removed as counsel, and a motion for a new trial followed.*

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* The matter was not raised earlier because, it is undisputed, Varon did not inform either his own client or the other petitioners or counsel of his relationship with Forman until after the trial. At that time, the trial court reprimanded Varon (R. 1385a). Thus, counsel's knowledge cannot be imputed to the client. See *Illinois* v. *Allen*, 397 U.S. 337 (1970); *Bartone* v. *United States*, 375 U.S. 52 (1963). See also Federal Rules of Criminal Procedure, Rule 43. Nor can Varon's silence be construed as a waiver of petitioners' constitutional rights. See *Glasser* v. *United States*, 315 U.S. 60, 69 (1941).

At the post-trial hearing, it was established that Forman and Varon were and had been well acquainted for some fifteen years (R. 1269a, 1326a).* Their homes were just a few blocks apart and their offices were across the street from each other (R. 1269a-71a). They met quite often on the street and sat together in restaurants (R. 1272a, 1329a-30a). They dined together at the home of a mutual friend, and Forman visited Varon at his home to pay a condolence call (R. 1272a, 1275a-76a). This relationship continued until the trial of the case, the two men admittedly seeing each other "quite often" in 1971 (R. 1271a-72a).

Although the trial court had conducted a searching voir dire examination, clearly designed to elicit such information, Juror Forman kept his relationship with counsel Varon concealed. Incredibly, he made no disclosure although asked the following pointed questions:

> "Do you know or are you related by blood or marriage to counsel for the defendants or counsel for the government?" (R. 1213a).
>
> * * * * *
>
> "Is there anyone else who had any connection in any way with any of the lawyers in this case . . . ." (R. 1214a).
>
> * * * * *
>
> "Can you think of any matter which you should call to the Court's attention which may have some bearing on your qualification as a juror?" (R. 1227a).

Forman did affirmatively participate in the voir dire, advising the court of his prior jury service, prior government employment (twenty-five years earlier) and prior tax

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* References to "R.—a" are to pages in the Appendix to the Record on Appeal below. References to "—a" are to the Appendix to this Petition.

audit (twenty-five years earlier) (R. 1215a, 1222a, 1228a). When the inquiry related to any relationship with counsel, however, Forman withdrew into silence, although another talesman responded to the inquiry by revealing a casual and indirect association with Varon (R. 1213a).

At the post-trial hearing, Forman assured the trial court that his acquaintance with Varon had no effect on his verdict, and the trial court, though treating the non-disclosure as sufficiently material to warrant disciplinary action, denied the motion (R. 1390a). On appeal, the court below held that "both the juror and defense counsel should have disclosed that they were acquaintances" (8a) but affirmed because the record did not establish that the non-disclosure "was prompted by prejudice or caused prejudice" (9a).*

By denying petitioners' new trial motion, the trial court deprived petitioners of their Sixth Amendment right to trial by an impartial jury. The court of appeals opinion affirming is directly contrary to the decisions of this Court, and is in conflict with decisions of other courts of appeals.

In *Irvin* v. *Dowd,* 366 U.S. 717 (1961), this Court held that "the right to jury trial guarantees to the criminally

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* The court below did not base its decision on the fact that the concealed relationship was with defense counsel and not government counsel. It is not difficult to perceive that Forman's relationship—even though with defense counsel—and the concealment of that relationship may have predisposed him *against* petitioners. For example, Forman may have felt ill-will toward counsel for some extraneous reason. Or he may have felt that his concealment could expose him to sanctions, and that this risk might be minimized if a guilty verdict were returned. Thus, Forman may have decided to sacrifice petitioners in order to save himself. However, attempts to reconstruct Mr. Forman's thought processes are both undesirable and unnecessary in light of the case law. Concealment of a material fact by a prospective juror works a fraud on the Court and the judicial process as a whole. A juror who has thus trifled with the Court has "made its processes a mockery." *Clark* v. *United States,* 289 U.S. 1, 12 (1932).

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accused a fair trial by a panel of impartial 'indifferent' jurors." 366 U.S. at 722. In order to secure this sacred right, our system has erected a number of safeguards (see, *e.g., Swain* v. *State of Alabama,* 380 U.S. 202 (1965); *Leonard* v. *United States,* 378 U.S. 544 (1964); *Shepherd* v. *State of Florida,* 341 U.S. 50 (1951)), among which is the traditional jury voir dire. Since "impartiality is not a technical conception" but is "a state of mind," the goal of the voir dire inquiry is "the ascertainment of this mental attitude of appropriate indifference." *United States* v. *Wood,* 299 U.S. 123, 145-46 (1936). The requisite "indifference" may be lacking by reason of a talesman's relationship to one of the parties (*Cook* v. *United States,* 379 F.2d 966 (5th Cir. 1967)), because he has prejudged the case (*United States* v. *Burr,* 25 Fed. Cas. 49 (1807)), or, as here, because he has given knowingly untrue answers on the voir dire (*Clark* v. *United States,* 289 U.S. 1 (1932)).

By wilfully concealing material information—specifically sought out on the voir dire—a juror places himself in a position where he has an interest in the outcome. Since he has made a conscious judgment to withhold the truth, he brings to the jury box a mental attitude unlike that of any other juror, a mental attitude which is, by definition, not one of "appropriate indifference." That such juror misconduct dooms the ensuing trial appears clearly from *Clark* v. *United States*:

> "A talesman when accepted as a juror becomes a part or member of the court . . . The judge who examines on the voir dire is engaged in the process of organizing the court. If the answers to the questions are wilfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only. His relation to the court and to the parties is tainted in its origin; it is a mere pretense and sham." 289 U.S. at 11.

Although the burden may rest on a defendant to establish the charge of partiality, there are circumstances in which the law requires no showing of actual bias. In such cases, a presumption of partiality arises from the objective circumstances, and the offending juror's ritualistic incantation of a lack of actual prejudice is accorded no weight. This principle found early expression by Chief Justice Marshall in *United States* v. *Burr*, 25 Fed. Cas. 49 (1807):

> "The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice." 25 Fed. Cas. at 50.

This presumption of partiality applies with equal force where there has been a material non-disclosure by a talesman, for by his concealment the juror has amply demonstrated that he had some cause to practice deception or else had little regard for the oath. In short, by such conduct the juror has demonstrated that he is untrustworthy, and an additional showing of actual prejudice is unnecessary. Thus, in *Clark* v. *United States*, 289 U.S. 1 (1932), where the juror concealed that she had worked for one of the defendant's companies as a typist for about two weeks during a summer two years before trial, but did not know or come into contact with any of the defendants personally, this Court held:

> "Bias is to be gathered from the disingenuous concealment which kept her in the box. She was intruding

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into a relation for which she believed herself ineligible, and intruding with a motive." 289 U.S. at 10.

Nor can such a demonstrably untrustworthy juror retroactively purify himself by testifying that he was not prejudiced in fact. *Clark* v. *United States*, 289 U.S. 1 (1932).* Especially is this so where the offending juror's testimony is offered after he has participated in rendering a verdict. At that juncture he is doubly suspect; not only has he practiced deception at the outset, but his subsequent testimony —not volunteered, but resulting from the discovery of his earlier deception—is now colored by his powerful personal interest in protecting himself from sanctions.** Were he to admit that he was, in fact, prejudiced, he would be confessing to a contempt of court.

Despite the rulings in *Burr* and *Clark*, there has developed a separate line of authority, followed by the court below, which holds that unless the defendant can show specific prejudice, relief will be denied. This is the rule in the First, Fifth, Eighth and Tenth Circuits. See *Carpintero* v. *United States*, 398 F. 2d 488 (1st Cir. 1968); *United States* v. *Cashio*, 420 F. 2d 1132 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); *Roberson* v. *United States*, 249 F. 2d 737 (5th Cir.), *cert. denied*, 356 U.S. 919

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* The oath of a contemnor is no longer a bar to a prosecution for contempt. This Court in *Clark* "renounce[d] the doctrine altogether and stamp[ed] out its dying embers." 289 U.S. at 19. It spoke of the doctrine as having "taken its place with ordeal and wager of law and trial by battle among the dimly remembered curios of outworn modes of trial." 289 U.S. at 19. Since the offense to the judicial process is precisely the same, whether vindication is sought by the government or the defendant, the oath of the offending juror should bar neither type of proceeding.

** Even when the juror has no competing personal stake but swears impartiality only in connection with a motion to change venue, this Court has noted that "the psychological impact requiring such a declaration . . . is often its father." *Irvin* v. *Dowd*, 366 U.S. 717, 728 (1961).

(1958); *Fabian* v. *United States*, 358 F. 2d 187 (8th Cir.), *cert. denied*, 385 U.S. 821 (1966); *Imholte* v. *United States*, 226 F. 2d 585 (8th Cir. 1955); *Brown* v. *United States*, 356 F. 2d 230 (10th Cir. 1966). These circuits require that a showing of actual prejudice be made and permit the offending juror to testify to a lack of prejudice. As might be expected, there is no reported decision applying this test in which actual prejudice has been found, and no reported decision in which an offending juror has confessed that he was, indeed, prejudiced.*

These circuits are in direct conflict with *Clark* and *Burr* and the District of Columbia Circuit which recently held:

> "Problems abound in any attempt to analyze the subconscious impulses that Kemper [the juror] may or may not have had toward appellant Jackson as a result of his experience. It is enough to say we think the facts give rise to a presumption that Kemper lacked the

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* There can be little doubt that if trial of this case had resulted in jury disagreement, the juror's concealment would have led to a contempt proceeding. See *Clark* v. *United States*, 289 U.S. 1, 10 (1932). The quality of the offense to the judicial process does not, of course, turn on the verdict. The offense is equally grave whether the jury convicts, acquits or fails to achieve a verdict. Yet, to require a showing of actual prejudice when the jury convicts and to permit the offending juror's testimony to resolve the issue—a procedure which has been rejected in the contempt context—is to subvert the right to an impartial jury, and effectively to remove any method by which the *defendant* (the only party whose constitutional rights are involved) may vindicate his right. The end result is to nullify the jury voir dire as a meaningful method of securing an impartial jury. As Chief Justice Marshall observed: "It would be strange if the law was chargeable with the inconsistency of thus carefully protecting the end from being defeated by particular means, and leaving it to be defeated by other means." *United States* v. *Burr*, *supra*, 25 Fed. Cas. at 50. And to paraphrase the Chief Justice, it would be strange if the law would be so solicitous to secure a fair trial as to provide for the jury voir dire, and yet be totally regardless of intentional violations of its proper office (*Ibid.*).

impartiality required of jurors by the sixth amendment and that Jackson was prejudiced thereby. Once such a presumption arises, as we noted in *Ryan* v. *United States,* 89 U.S. App. D.C. 328, 330, 191 F. 2d 779, 781 (1951), *cert. denied sub nom. Duncan* v. *United States,* 342 U.S. 938, 72 S. Ct. 779, 96 L. Ed. 691 (1952), a judge's conclusion that a juror's impartiality has not been affected 'may not rest entirely upon the testimony of jurors * * * because that alone is too uncertain a basis for resolving the issue of prejudice.' . . . We conclude that Kemper's presence on the jury which convicted appellant had such a strong tendency to deny him a trial by twelve impartial jurors as guaranteed by the sixth amendment that we are constrained to order a new trial." *Jackson* v. *United States,* 395 F. 2d 615, 618 (D.C. Cir. 1968).

The Third Circuit joins the District of Columbia Circuit in not requiring a showing of actual prejudice where there had been non-disclosure by a juror invoking instead the presumption of partiality first expressed by Chief Justice Marshall in *United States* v. *Burr,* 25 Fed. Cas. 49 (1807). *United States ex rel. Fletcher* v. *Cavell,* 287 F. 2d 729 (3d Cir.), *cert. denied,* 366 U.S. 944 (1961); *United States ex rel. De Vita* v. *McCorkle,* 248 F. 2d 1 (3d Cir.), *cert. denied,* 355 U.S. 873 (1957).

This case presents the opportunity to resolve a serious conflict among circuits relating to the constitutional right to trial by an impartial jury. Specifically, this case concerns the legal consequences which should follow from the post-conviction discovery that a panel member was selected for jury duty only by concealing material facts on the voir dire. This Court has not spoken to this important issue in forty years. The conflict among circuits and the

frequency with which the issue arises are persuasive reasons for granting certiorari here.

2. Thirteen years prior to trial of this case, petitioner Smith, then eighteen years of age, was convicted of breaking and entering in the Dade County Criminal Court of Record (R. 858a). That prior conviction was obtained in violation of Smith's constitutional right to counsel (R. 1186a). On trial of the present case, the government brought out this prior invalid conviction upon the cross-examination of Smith (R. 857a-58a). This testimony was first challenged on a new trial motion which was denied without opinion or findings of fact (R. 1383a). Denial of this motion deprived petitioners* of their constitutional rights, and was directly in conflict with the clear rulings of this Court in *Burgett* v. *Texas,* 389 U.S. 109 (1967); *United States* v. *Tucker,* 404 U.S. 443, 30 L. Ed. 2d 592 (1972); and *Loper* v. *Beto,* 405 U.S. 473, 31 L. Ed. 2d 374 (1972).**

In *Burgett,* this Court firmly established the principle that a conviction obtained through procedures violating constitutional standards cannot be used at a subsequent trial on another charge "either to support guilt or enhance punishment . . . " 389 U.S. at 115. *Burgett* arose from the

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* The error in admission of this constitutionally invalid conviction requires reversal as to all petitioners. The trial court did not instruct the jury that the conviction was only admissible against Smith. Even if it had, such an instruction could not purge the trial of the taint resulting from the unconstitutionality of that conviction. *Beto* v. *Stacks,* 408 F.2d 313 (5th Cir. 1969). Both Nadalines were prejudiced by the admission of this conviction, since they were painted by the government as acting in concert not just with a co-worker, but with a convicted felon.

** It should be noted that under the new Rules of Evidence the conviction would be inadmissible simply by reason of its age and the time that has passed since Smith completed serving his sentence. Rule 609(b), Rules of Evidence for United States Courts and Magistrates.

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use under a recidivist statute of a prior conviction obtained in violation of the right to counsel. This Court held that the admission into evidence of a constitutionally infirm conviction had resulted in a further deprivation of the defendant's constitutional rights which was inherently prejudicial:

> "To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto*, 384 U.S. 269, 16 L ed 2d 526, 86 S.Ct. 1447) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." 389 U.S. at 115.

In *Tucker*, the defendant's previous convictions were taken into consideration in imposing sentence. Two of these convictions were subsequently determined to be constitutionally infirm. This Court held that "a sentence founded at least in part" upon invalid prior convictions is constitutionally impermissible (30 L.Ed.2d at 596). And in *Loper*, this Court held that the use of prior void convictions for impeachment purposes deprives a criminal defendant of due process of law.

It follows from these three decisions that the introduction into evidence of Smith's constitutionally invalid conviction requires reversal of petitioners' convictions. The court below, however, reached the opposite result.

In upholding admission of Smith's constitutionally defective prior conviction, the lower court enlarged beyond recognition a narrow exception to the principle enunciated in *Burgett*, *Tucker*, and *Loper*. The court below concluded that because Smith had been asked on direct: "Are you a

violent person" it was proper for the government to "counter" by eliciting that Smith had thirteen years before been convicted of breaking and entering. *United States ex rel. Walker* v. *Follette,* 443 F. 2d 167 (2d Cir. 1971), relied on by the court below, provides no support for its decision. *Walker,* distinguished but not approved in *Loper* (31 L.Ed. 2d at 381, n.11), merely held that a defendant cannot elect to take the stand and perjure himself with impunity simply because the answer lies only in illegally obtained evidence:

> "If . . . [a defendant] lies in the course of his testimony, he lays himself open to attack by means of illegal evidence which otherwise the prosecution could not use against him." 443 F. 2d at 170.*

This element—crucial to an exception from the constitutional prohibition—is simply not present here. While the lower court invoked this exception, the necessary predicate was not present. Smith did not lie in the course of his testimony. Rather, significantly enlarging the narrow exception, the lower court merely concluded that a thirteen-year-old conviction for breaking and entering is inconsistent with "peaceful conduct." Smith did not testify, however, that his conduct was always "peaceful." He testified only that he was not a violent person. That his conduct may not always have been "peaceful," *i.e.,* lawful, does not establish—or even suggest— that his testimony that he was not a violent person was false. Inconsistency with "peaceful conduct" is not the same as inconsistency with non-violence. Indeed, the record is bare of the merest suggestion that

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* The common thread running through *Walker* and the cases on which it relies (*Walder* v. *United States,* 347 U.S. 62 (1954) and *Harris* v. *New York,* 401 U.S. 222 (1971)), is the fact that in each the defendant elected to testify and told a specific lie: in *Walder,* that he had never possessed narcotics; in *Harris,* that he had not made a statement to the police; and in *Walker,* that he had never been convicted of a crime.

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Smith's prior conviction involved any violent activity at all. The only pertinent testimony—that of petitioner Smith on redirect—indicates that the prior conviction did *not* involve any violence (R. 859a).*

The import of the ruling below is that the *Burgett-Tucker-Loper* principle may be ignored on the slightest pretext. Though the most recent of this trilogy is but one year old, the lower courts are already depriving its rule of force, creating exceptions as cases arise. This is the second time in that short time span that a lower court has utilized this Court's reference to *Walker* as permitting erosion of the constitutional prohibition against the use of a prior invalid conviction. *See, e.g., United States* v. *Cole,* 463 F. 2d 163 (2d Cir.), *cert. denied,* —— U.S. ——, 34 L.Ed.2d 193 (1972).

This Court recognized—in *Burgett, Tucker* and *Loper* —that the admission of a constitutionally defective prior conviction is inherently prejudicial. Moreover, the use of

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* The lower court also avoided the *Burgett-Tucker-Loper* rule by treating the admission of the invalid conviction as harmless error (14a), an approach inconsistent with this Court's rulings. In *Burgett,* this Court held that the admission of a prior constitutionally infirm criminal conviction is "inherently prejudicial", and that instructions to disregard it did not make "the constitutional error 'harmless beyond a reasonable doubt' within the meaning of *Chapman* v. *California,* 386 U.S. 18." 389 U.S. at 115. No limiting instructions were given here. Indeed, in treating the error as harmless, the lower court merely repeats the error it made when *Loper* was before it. (440 F. 2d 934, 937). Rejecting the lower court's approach in *Loper*—repeated here—this Court held that "there is little room for a finding of harmless error, if, as appears on the record now before us, Loper was unrepresented by counsel and did not waive counsel at the time of the earlier convictions." 31 L.Ed.2d at 381, n.12. It should also be noted that the mere fact that the jury here acquitted petitioners on three counts—in two of which Smith was not even named—lends absolutely no weight to the thought that the error may have been harmless. See *Dunn* v. *United States,* 284 U.S. 390, 393 (1932); *United States* v. *Dotterweich,* 320 U.S. 277, 279 (1943).

unconstitutionally obtained evidence, which Smith's prior conviction surely was, is an affront to "the imperative of judicial integrity." *Harrison* v. *United States,* 392 U.S. 219, 224, n. 10 (1968). In order to avoid a further erosion of the clear constitutional principle this Court should grant certiorari and reverse the convictions.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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February, 1973

APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-1431

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK NADALINE, JOSEPH NADALINE
and LEROY SMITH,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(January 3, 1973)

Before:

COLEMAN, AINSWORTH and DYER,

Circuit Judges.

COLEMAN, Circuit Judge: Title 18, §1951(a) of the United States Code [The Hobbs Act, approved June 25, 1948, 62 Stat. 793, as amended] reads as follows:

"§1951. Interference with commerce by threats or violence

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both."

The two indispensable elements for conviction under this statute are (1) interference with interstate commerce and (2) extortion, *Stirone* v. *United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960); *United States* v. *Provenzano,* 3 Cir., 1964, 334 F.2d 678, cert. denied 379 U.S. 947, 85 S.Ct. 440, 13 L.Ed.2d 544.

1. The Convictions and Acquittals

The indictment was in seven counts.

Frank Nadaline, Joseph Nadaline, and Lawrence Leroy Smith were found guilty of conspiring to obstruct commerce through extortionate means.

Frank Nadaline and Joseph Nadaline were likewise convicted, as a method of wilfully and knowingly interfering with commerce, of threatening to cause personal harm to John W. Bryan unless the latter agreed not to employ John H. Eggers as a sales representative of Drive-In Cameras, Inc. This offense allegedly occurred on January 20, 1971.

Frank Nadaline and Joseph Nadaline were also convicted of an assault on one John H. Eggers on January 25, 1971, allegedly committed for the same purpose.

Again, as a part of the same course of conduct, for the same purposes, Joseph Nadaline and Lawrence Leroy Smith were convicted of throwing a rock, on January 25, 1971, through the window of Drive-In Cameras, Inc., at 260 South Federal Highway, Pompano Beach, Florida.

The defendants were thereafter sentenced and the judgment of the District is affirmed.

The same jury returned verdicts of "not guilty" in favor of Frank Nadaline as to two additional counts charging him with similar activity as to one Frances Kivett.

Joseph Nadaline and Lawrence Leroy Smith were found "not guilty", in the same context, of a threat of personal harm against John H. Eggers allegedly committed on January 12, 1971.

2. The Background

Frank Nadaline was Chairman of the Board of Harrison Fotochrome, a public corporation with over ten thousand stockholders. Harrison operates photofinishing plants in Denver, Cleveland, New York, and Florida. Joseph Nadaline is Frank Nadaline's son, and manages the professional color division of the corporation. Lawrence Leroy Smith is an employee of Harrison, functioning as a laborer in its Hollywood, Florida, plant.

Among Harrison's competitors in South Florida is Drive-In Cameras, Inc., located chiefly in Fort Lauderdale and Pompano, Florida. Drive-In is partly owned by John W. Bryan. The record shows that it has been and is engaged in interstate and foreign commerce.

John H. Eggers worked at Harrison as a sales representative. As a result of asserted dissatisfaction with the services given the accounts he represented, Eggers resigned his employment on January 11, 1971.

The next day Eggers, the former employee of Harrison, met with Bryan and told him that some of the accounts he

represented at Harrison would follow him wherever he went. Realizing the potential of Eggers' services, Bryan hired him.

3. The Activities as to Bryan

Eight days later, at about 9:30 A.M., Bryan received a phone call from Frank Nadaline. Nadaline told Bryan:

> "I want you to get rid of Jack Eggers. We fired him for stealing. You don't want to hire a thief. I want you to tell me now that you are going to discharge him."

Bryan replied that he would have to think about it. At 11 o'clock that same morning, Frank Nadaline, Joseph Nadaline, and another man came to Bryan's place of business and told him to go into his private office. Frank told his son Joseph to stand outside the office door and not to let anybody use the telephones. Frank and the other man then went into the office with Bryan. The following conversation ensued:

> Frank Nadaline (talking to the other man): "You see this guy. You see I want you to work him over."
>
> (To Bryan): "You got five minutes to make up your mind to tell me that you are going to get rid of Eggers."
>
> The other man: "He looks like an intelligent fellow. He don't want to go through all of this for one stinking employee."

One of Bryan's business partners, Mrs. Thomas, had noticed the Nadalines go into Bryan's office and became concerned about the situation. She summoned one of her own employees to go into Bryan's office. Upon being interrupted by the employee, Frank Nadaline decided to leave but not before telling Bryan that he wanted a reply to his request by Friday of that week.

4. The Assault of John H. Eggers

On January 25, 1971, Eggers had breakfast at William City Drug Store. Upon leaving the store at about 8:45 A.M., he noticed Frank and Joseph Nadaline standing on either side of his car. Joseph Nadaline told Eggers that he wanted him to come with them. Eggers resisted and was knocked to the ground by Joseph Nadaline. While thus down Eggers was twice kicked by Frank Nadaline.

Joseph Nadaline admitted the confrontation but said that they only wanted to question Eggers about work stolen from their plant and also about a company car which Eggers had abandoned. He claimed that he hit Eggers in self-defense. He also denied that his father was with him but instead stated that another Harrison employee was there. However, he said that he told the other employee that Eggers was trying to rob him and that is why he hit him. As an explanation for this falsehood he said that the other man was "new" and would not have understood the problems the company was having with Eggers.

Robert Mills, owner of the William City Drug Store, said that Frank Nadaline later admitted to him that he hit Eggers. Frank Nadaline testified that he was at a doctor's office on the morning of the alleged assault, but the doctor's office was only a few minutes drive from the drug store and the doctor testified that he could not have seen Frank until 9:45, or later.

5. Breaking a Window of Drive-In Camera

At approximately four o'clock on the morning of January 26, 1971, James Iouna closed the steak house where he worked and met his fiancee out front. The restaurant was located in Pompano, Florida, across the street from a Drive-In camera store. Hearing a crash [a glass window had been broken] Iouna noticed a gold colored automobile

parked in front of the camera shop. They also noticed a black male getting in the car and a white male driving. They observed these two men for a couple of minutes before they drove off. Iouna called the police and gave them a description of the men, their car, and their direction of travel. A few moments later a car fitting the description was stopped by the police about seven blocks from the camera store. The occupants of the automobile, Joseph Nadaline and Lawrence Leroy Smith, matched the description of the men Iouna and his fiancee had seen. Explaining their reason for being in the area at the early morning hour, appellants stated that a window at the Harrison plant in Pompano had been broken and they were following a car which had passed by the plant about the time of that occurrence. At another point Smith testified that they were riding around looking for girls.

6. Alleged Trial Errors

The appeal raises several issues, to be discussed in the following order:

(1) Sufficiency of the evidence.

(2) Non-disclosure of acquaintance between a trial juror and defense counsel as affecting jury's partiality and the effective assistance of counsel.

(3) Alleged prosecutorial misconduct in the cross-examination of appellant Smith and in the government's summation.

(4) The admission of Smith's prior conviction by way of impeachment.

7. Sufficiency of the Evidence

Appellants raise the contention that 18 U.S.C., §1951 (or The Hobbs Act, as it is more commonly known) is an

inappropriate prosecutorial tool in this case and that the evidence was insufficient to meet the requirements of the statute. Appellants argue that even *if true* the assault upon Eggers, the broken window at the camera store, and the visit paid Bryan by the Nadalines only amounted to "fighting back" by one competitor against another *and do not amount to extortion affecting interstate commerce.*

The impact of extortion need affect interstate commerce only in a minimal degree, *United States* v. *Hyde,* 5 Cir., 1971, 448 F.2d 815, cert. denied 404 U.S. 1058, 92 S.Ct. 947, 30 L.Ed.2d 745.

It has been held that to prove an attempt to extort it is necessary to show an attempt to arouse fear, *Carbo* v. *United States,* 9 Cir., 1963, 314 F.2d 718, cert. denied 377 U.S. 953, 84 S.Ct. 1626, 12 L.Ed.2d 498. The threats to Bryan, the breaking of the camera store window, and the assault upon Eggers have all the earmarks of a design to instill fear in both men.

Obviously, the extortion here involved was concerned with business accounts and with unrealized profits from those accounts. Such intangible property has been held to be included within those rights protected by the Act, *United States* v. *Tropiano,* 2 Cir., 1969, 468 F.2d 1269, cert. denied 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530.

Finally, appellants maintain there is no showing that any of the alleged actions was undertaken pursuant to a conspiracy to extort. Conspiracy convictions frequently must depend on circumstantial evidence as indicative of an overall plan.

The acts and conduct of the alleged conspirators in this case, coupled with reasonable inferences to be drawn therefrom, left the jury free to conclude beyond a reasonable doubt that an unlawful agreement, express or implied, existed among these defendants, *United States* v. *Jacobs,* 5 Cir., 1971, 451 F.2d 530, cert. denied 92 S.Ct. 1170.

8. Non-disclosure of Acquaintance Between a Juror and Defense Counsel

During the jury selection process one juror failed to disclose in response to panel questions from the Court that he knew the *chief defense counsel,* Joseph Varon. This man was later chosen as foreman of the jury. The extent of the relationship was that both men lived in Hollywood, Florida, had known each other for about fifteen years, were never formally in the society of one another, and their meetings had been of a fortuitous nature. Subsequent to the trial, at an evidentiary hearing, the juror stated that this acquaintance had no bearing on his decision in the case.

Of course, both the juror and defense counsel should have disclosed that they were acquaintances. However, our appraisal of this record raises no impression that the relationship impaired the appellants' right to a fair and impartial jury. See *Roberson* v. *United States,* 5 Cir., 1958, 249 F.2d 737, cert. denied 356 U.S. 919, 78 S.Ct. 704, 2 L.Ed.2d 715.

In *Roberson* one of the jurors was a friend of the prosecuting attorney, the two having had frequent and casual contact for a number of years. Defense counsel knew that the juror and prosecutor were acquainted but this fact was never developed during voir dire. Finding no reversible error, we pointed out that a juror is not disqualified per se because he is acquainted with counsel in a case. See, also, *Carpintero* v. *United States,* 5 Cir., 1968, 398 F.2d 488.

In the case now before us, defense counsel well knew that he and the prospective juror were acquaintances. He did not call this to the attention of the court. He did not ask the juror about it. He exercised no peremptory challenge against him. Silence reigned supreme—until the unfavorable verdict came in. Then there was a

motion for a new trial on this ground. There is nothing of substance in this record to indicate that the failure to disclose an acquaintance between the lawyer and the juror was prompted by prejudice or caused prejudice. Indeed, as already indicated, the jury acquitted all three defendants of various charges.

In the absence of a material non-disclosure from which it can be conclusively inferred that prejudice resulted as a matter of law, the party asserting such prejudice has the burden of proof, *Brown* v. *United States,* 10 Cir., 1966, 365 F.2d 230; *Fabian* v. *United States,* 8 Cir., 1966, 358 F.2d 187, cert. denied 385 U.S. 821, 87 S.Ct. 46, 17 L.Ed.2d 58.

There is no reasonable basis upon which we can allow this episode to reverse these convictions.

Appellants argue that the non-disclosure by Varon constituted a denial of effective assistance of counsel, even in the absence of any showing of actual prejudice.

Such a contention may be well founded where the non-disclosure concerns *a conflict of interest* which could reasonably have a direct bearing on the loyalty of counsel to his client. We are confident that the acquaintance with the juror *did not* affect Mr. Varon's complete and undivided loyalty to his client. The record reveals a dedicated and thorough defense for not only his client, Frank Nadaline, but of all the other appellants as well. Mr. Varon made the only opening statement in behalf of the defense, he cross-examined the government witnesses testifying to counts in which his client was charged, he made numerous objections throughout the trial, he was spokesman for all defense counsel, and he filed the motion for appeal. It simply cannot be said that Varon's representation was perfunctory, in bad faith, or a pretense, *Williams* v. *United States,* 5 Cir., 1971, 443 F.2d 1151; *Harried* v. *United States,* D.C. Cir., 1967, 389 F.2d 281.

9. The Alleged Prosecutorial Misconduct

a. The Cross-examination of Appellant Smith

Smith took the stand in his own defense and denied that he knew about any interference with Raymond Eubanks, a former employee of Harrison. During cross-examination, after again denying having any knowledge of interference with Raymond Eubanks, he was asked the following question: "You didn't know anything about fire being set to his car". Objection was immediately made on the basis that no evidence was introduced to support the question. The appellant never answered and the following then took place:

> "The Court: I will sustain the objection and the jury will completely disregard any including of the incident in the question. It is not a part of the evidence in the case and it is not to be considered by the jury in any way.
>
> "Mr. Varon: I think he should be admonished to stay away from something like that.
>
> "The Court: Mr. Tifford, you realize that you are not to include in any questions anything that is not supported by evidence in this case.
>
> "Mr. Tifford: I am sorry, Your Honor."

The contention that this admonition was insufficient and that the subsequent motion for mistrial should have been granted cannot, by an overwhelming wealth of commonplace authority, be sustained.

b. The Government's Summation

Government counsel in his closing argument referred to the alleged assault of Eggers by Frank and Joseph Nadaline. In recounting Robert Mills' testimony, the prosecutor stated that "what Frank Nadaline told him one

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month after the assault erases all doubt as to the culpability of the defendants in this case". Appellants argue that the government's reference to "defendants" was erroneous since Mills only implicated Frank and Joseph Nadaline and not Smith. The answer to this contention is short. Only the Nadalines were indicted for the assault count and they are unmistakably the individuals to whom the prosecutor was referring.

10. The Admission of Smith's Prior Conviction

The appellant Smith took the witness stand in his own defense. On *direct examination* he was asked by his own counsel:

"Q. Are you a violent person.
"A. No, I'm not."

On cross-examination by the United States Attorney the following occurred:

"Q. Now, Mr. Smith, you testified on direct examination further that you are not a violent person. Do you recall your testimony?
"A. I think I recall that.
"Q. Have you ever been convicted of a felony?
"A. Have I ever been convicted of a felony?
"Q. Yes.
"A. Yes.
"Q. You have?
"A. Yes.
"Q. What was the nature of the felony for which you were convicted?
"A. I think they said 'B&E'.
"Q. Breaking and entering?
"A. That's the term, yes, sir."

There was no objection to this cross-examination.

This testimony was first challenged on a motion for a new trial in which it was stated, "The Government knew, or should have known, that back in 1958 when this defendant was convicted of a crime of breaking and entering, which is a felony conviction, the said conviction was procured in the Criminal Court of Record, in and for Dade County, Florida, without benefit or assistance of counsel. This cross-examination by the Assistant United States Attorney was offered solely for its general tendency to discredit the character of Lawrence Leroy Smith and operated not only to this defendant but also to the other defendants jointly tried with him".

Attached to the motion was a certificate of the Clerk of the Dade County Criminal Court of Record "that an examination of the file and records in the above case, wherein the defendant was convicted of breaking and entering and sentenced April 16, 1957, to serve one year in the State Penitentiary, discloses that at no stage in the proceedings was the said Lawrence Leroy Smith represented by counsel."

The certificate said nothing about indigency or waiver of counsel.

There was no evidentiary hearing in the District Court and the motion for a new trial was denied without any finding of fact with reference thereto.

A Judge of this Court subsequently allowed Smith "to supplement the record" on appeal with an affidavit from Smith that he was not advised of his right to counsel, that he did not have the money with which to employ counsel, and that he did not voluntarily waive his rights to counsel at the time of the 1957 conviction.

The applicable law is discussed in the decision rendered by the Supreme Court in *Loper* v. *Beto*, —— U.S. ——, 92 S.Ct. 1014, —— L.Ed.2d —— (1972). In that case, four Justices concurred in an opinion dealing solely with the

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following constitutional question: Does the use of prior, void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case?".

Four Justices answered the question in the affirmative. For various reasons, four Justices disagreed. One Justice concurred in the result, saying that the lower court should find whether the prior convictions were legally infirm for lack of counsel or failure to waive counsel, or whether there was harmless error.

The four plurality Justices were careful to note [Footnote 11] that "This is not a case where the record of a prior conviction was used for the purpose of directly rebutting a specific false statement made from the witness stand".

We are not left to ignore the care with which the plurality opinion made this notation, citing *Walker* v. *Follette*, 2 Cir., 1971, 443 F.2d 167, and other cases which were discussed in *Walker*.

In *Walker* v. *Follette*, the defendant testified *on direct examination* that he had never been convicted of a crime. On cross-examination, the prosecution elicited from him the fact that he had suffered prior convictions. It was held that this did not deprive Walker of a fair trial, even if the convictions were invalid for lack of legal representation.

The *Walker* court reasoned, "If a defendant testifies, he puts his credibility in issue. If he lies in the course of his testimony, he lays himself open to attack by means of illegal evidence which otherwise the prosecution could not use against him".

In the light of the foregoing, we construe *Loper* to stand for the proposition that "where their use might well have influenced the outcome of the case", defendants must not have been impeached by reference to convictions obtained in violation of the right to counsel, but this rule does not

apply if the impeachment is justified by specifically false testimony given while on the witness stand.

Here, Smith, testifying in his own behalf, swore that he was not a violent person. It turned out to be a fact that he had been convicted of breaking and entering, an activity inconsistent with peaceful conduct.

Moreover, it seems clear to us that the proof of the prior conviction did not influence the outcome of the case. Both Smith and his co-defendants were acquitted of other charges laid against them in the indictment. This fact must also be taken into consideration in the evaluation of the other claims of prejudicial error already discussed.

Conclusion

The convictions of Frank Nadaline, Joseph Nadaline, and Lawrence Leroy Smith are, in all respects,

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1431

D. C. Docket No. 71-493-CR-CA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK NADALINE, JOSEPH NADALINE
and LEROY SMITH,

Defendants-Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Before:

COLEMAN, AINSWORTH and DYER,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 3, 1973

Issued as Mandate:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1096

FRANK NADALINE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners claim they were impermissibly prejudiced by the failure of a juror and of the chief defense lawyer to reveal their acquaintanceship, and by the government's questioning of petitioner Smith concerning a prior conviction obtained when he was not represented by counsel.

A seven-count indictment returned in the United States District Court for the Southern District of Florida charged petitioners with having obstructed, delayed, and affected commerce through extortionate means and with conspiring to commit the substantive offenses, in violation of 18 U.S.C. 1951 and 371. After a jury trial, each was convicted on the conspiracy count and on one or more of the substantive counts.[1] Frank Nadaline was sentenced to

---

[1] Frank Nadaline was found guilty on two of the four substantive counts in which he was charged. Joseph Nadaline was found guilty

concurrent terms of four years' imprisonment, Joseph Nadaline to concurrent terms of three years' imprisonment, and Lawrence Leroy Smith to concurrent terms of one year's imprisonment. The court of appeals affirmed (Pet. App. 1a-14a).

The facts in this case are detailed in the comprehensive opinion below (Pet. App. 3a-6a). Briefly, the evidence at trial showed that Frank Nadaline, Joseph Nadaline, and Smith were respectively chairman of the board, division manager, and an employee of Harrison Fotochrome, which operated photofinishing plants in Florida and elsewhere. On January 12, 1971, Drive-In Cameras, Inc., a Florida competitor of Harrison, hired John Eggers, a former Harrison sales representative who controlled a number of accounts. On January 20, 1971, Frank and Joseph Nadaline visited John Bryan, the owner of Drive-In Cameras, and threatened to "work him over" unless he fired Eggers. On January 25, 1971, Frank and Joseph Nadaline assaulted Eggers. On January 26, 1971, Joseph Nadaline and Smith threw a rock through a window of Drive-In's office in Pompano Beach.

1. Petitioners' contention that one juror's non-disclosure of his acquaintance with the chief defense counsel deprived them of their right to an impartial jury was thoroughly considered and properly rejected by the court below (Pet. App. 8a-9a), upon whose opinion we rely. The court correctly held that in the absence of a *material* non-disclosure from which prejudice is readily inferable,

---

on three of the four substantive counts in which he was charged. Lawrence Leroy Smith was found guilty on one of the two substantive counts in which he was charged. The specific offenses charged against each petitioner are described in the opinion below (Pet. App. 2a-3a).

"the party asserting such prejudice has the burden of proof" (Pet. App. 9a). The cases cited by petitioners do not conflict with the decision below; in each the inference of prejudice and partiality was compelling.[2] Here, there is only petitioners' speculation—contradicted by the juror's own testimony—that a casual acquaintanceship which even the defense lawyer thought not significant enough to mention *might* have prejudiced their substantial rights.

2. Petitioners also contend that they were impermissibly prejudiced by the prosecutor's questioning of petitioner Smith with respect to a prior felony conviction obtained when Smith was not represented by counsel. There was no objection to these questions at trial, and the record shows that they were intended, not to impeach Smith's credibility generally, but to rebut his specific statement on direct that he was not "a violent person" (Pet. App. 11a). The case is thus distinguishable from *Loper* v. *Beto*, 405 U.S. 473, relied on by petitioners, where this Court held it impermissible to impeach a defendant's credibility generally by the use of constitutionally invalid convictions. The plurality opinion in *Loper* expressly recognized that a different case would be presented where, as here, the prior conviction is used to rebut a specific statement made from the witness stand (405 U.S. at 482, n. 11).

---

[2] In *Jackson* v. *United States*, 395 F. 2d 615 (C.A. D.C.), a juror failed to disclose that he had had an affair with the defendant's wife, whom the defendant was charged with having murdered. In *United States ex rel. Fletcher* v. *Cavell*, 287 F. 2d 792 (C.A. 3), a juror failed to reveal that he was the son-in-law of the investigating detective, a witness at the trial. In *United States ex rel. DeVita* v. *McCorkle*, 248 F. 2d 1 (C.A. 3), a juror failed to disclose that he had recently been robbed in circumstances nearly identical to those of the robbery which the defendants were alleged to have committed, and he falsely denied knowing any state police officers when in fact he was daily escorted by a team of officers from the same unit that had investigated the robbery at issue.

Moreover, as the court below held (Pet. App. 14a), it cannot be said here that the single mention of the one conviction was so prejudicial that it "might well have influenced the outcome of the case" (405 U.S. at 480). Petitioners' assertions that they *all* were prejudiced (Pet. 12 and n. *) are wholly speculative. Rather, the record here supports the determination by the court below (Pet. App. 14a) that the jury was sufficiently discriminating to understand the limited relevance of Smith's conviction; it found each petitioner not guilty of at least one of the charges against him.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1096

FRANK NADALINE, JOSEPH NADALINE
and LAWRENCE LEROY SMITH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In its brief in opposition, the government fails to respond to the issues raised in the petition. A brief analysis underscores the appropriateness of this case for certiorari.

1. The government's argument that concealment by a dishonest juror did not deprive petitioners of the impartial jury guaranteed by the Sixth Amendment because there was no showing of actual prejudice misses the point. As shown in the petition (pages 8-11), the real issue is whether the non-disclosure was material, thus obviating any need for such a showing.

Resting on the opinion below, the brief in opposition tacitly adopts the circuit court's reverse application of the

test utilized in other circuits. Thus, the Third Circuit[1] and the District of Columbia Circuit[2] hold that if the non-disclosure is material, prejudice is conclusively inferred. The court below, however, purporting to apply this standard, held that because the juror later denied bias[3] and because defense counsel also concealed the relationship, prejudice was not shown and *therefore* the non-disclosure was not material.

It is plain from the record that the non-disclosure was material: The attorney was disciplined by the District Court (R. 1390a) and the Court of Appeals below explicitly recognized that "both the juror and defense counsel should have disclosed" the relationship (8a).

It is plain, too, that the non-disclosure was material as a matter of law. As enunciated by this Court in *Clark* v. *United States*, 289 U. S. 1, 11 (1932), the relation between the court and a deceitful juror "is tainted in its origin; it is a mere pretense and sham." Accordingly, unless the District Court examining on the voir dire was engaged in a futile exercise, the juror's active and willful concealment was material. Hence, no showing of actual prejudice was required, and application by the court below of a standard in conflict with that applied in other circuits warrants the grant of certiorari.

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[1] *United States ex rel. Fletcher* v. *Cavell*, 287 F. 2d 792, *cert. denied*, 366 U. S. 944 (1961), and *United States ex rel. DeVita* v. *McCorkle*, 248 F. 2d 1, *cert. denied*, 355 U. S. 873 (1957).

[2] *Jackson* v. *United States*, 395 F. 2d 615 (1968).

[3] Plainly not a purifying or trustworthy event under *United States* v. *Clark*, 289 U. S. 1 (1932). Moreover, since an admission of bias would have subjected him to a contempt proceeding, the juror's testimony must be viewed with suspicion.

2. Arguing that the admission of Smith's prior invalid conviction was harmless error, the government ignores the holdings of *Burgett* v. *Texas,* 389 U.S. 109 (1967), *United States* v. *Tucker,* 404 U.S. 443 (1972), and *Loper* v. *Beto,* 405 U.S. 473 (1972): Introduction of a constitutionally defective prior conviction is *inherently* prejudicial.

The government attempts to distinguish *Burgett* and its progeny by contending that "the record showed [the conviction was] intended not to impeach Smith's credibility generally, but to rebut his specific statement on direct that he was not 'a violent person.'" (Brief in Opposition, p. 3). This contention, understandably, is not buttressed by any citation to the record, a fact which highlights the fallacies in the government's position.

First, the record is devoid of any indication of the purposes for which the invalid conviction was introduced. The jury was never instructed that it was to consider the conviction solely as simple contradiction of a single statement made by Smith, nor that it could not be considered as general impeachment of Smith's credibility, nor that it was not evidence of guilt of the instant charges, nor indeed that the conviction had not been admitted against all three defendants. If the conviction was in fact introduced for a limited purpose, that notion was never communicated to the jury.

Second, and perhaps even more significant, the prior conviction—for breaking and entering—had no rebuttal value in the context of Smith's testimony. Breaking and entering, a crime against property, not persons, is neither necessarily nor logically inconsistent with non-violence.[4]

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[4] If Smith had testified on direct that he had never been convicted of a crime, the distinction noted—but not approved—in *Loper* (405 U.S. at 482, n. 11) might have some application here. Smith's direct testimony, however, included *no* statements concerning prior convictions.

Finally, the government's argument amounts to no more than the construction of what might have been a legitimate purpose for admission if the conviction had been *valid*. Fundamental to *Burgett, Tucker* and *Loper,* however, is the principle that such legitimacy does not overcome the renewed deprivation where the prior conviction is constitutionally defective.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, it is respectfully submitted that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

Dated: New York, New York
April, 1973